Supreme Court, U.S.
FILED
JAN 9 1997
CLERK

No. 96-243

In The

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICUS CURIAE*

The American Planning Association ("APA") is a non-profit association of 27,000 members, all of whom are employed in the field of land use planning or are otherwise vitally concerned with the discipline.

Virtually all members of APA are engaged in land use planning either on behalf of governmental bodies exercising regulatory authority over the use of real property or for the benefit of holders of land subject to land use regulation. Consequently, APA does not represent the interests of those who seek to increase the constitutionally permissible scope of government regulation nor of those who promote the interests, constitutional or otherwise of individual landowners. APA and its members are fundamentally and vitally interested in the promotion of the rational, predictable, effective, and beneficial use of real property consistent with the needs of individuals having recognized interests in property and the public at large. APA members are the professionals who engage in the planning to accomplish that fundamental goal.

SUMMARY OF ARGUMENT

Mrs. Suitum's takings claim is not ripe because she has not submitted an application for a development rights transfer that would determine the economic impact of the regulatory system on her property. Neither is there evidence in the record that Mrs. Suitum's property is

* The consents of the parties to the filing of this *amicus* brief are on file with the Clerk.

made valueless by the Tahoe Regional Planning Agency ("TRPA") regulations, and this Court has held that the retention of some value in property is enough to defeat a takings claim. This Court has made clear that under its takings jurisprudence there is no assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

Mrs. Suitum's filing of a building permit application did not satisfy the requirement that she make at least one application for approval because it was clear under TRPA's regulations that the building permit could not issue. However, there is a tension between the *Agins-MacDonald* rule that a landowner must submit one "meaningful" application and the *Hamilton Bank* rule that a landowner must utilize all available administrative relief at the local level. This tension creates a weakness in ripeness law that, frankly, some local governments have exploited to frustrate "as-applied" takings claims in federal courts.

This weakness in ripeness law promotes uncertainty in land use decision making by local governments that ultimately undermines the rational, predictable, effective and beneficial use of property – goals of vital concern to *Amicus curiae*. Because of these two rules, a landowner whose proposal has been denied has an agonizing choice. Should she "reapply" with something "less ambitious," or apply for relief from the land use agency? What is "meaningful" and what is "grandiose" within the limits of a planning and zoning program is a matter of judgment. *Amicus curiae* believes the Court should resolve this tension between these two rules and create a more precise

and fair basis for determining when federal courts have jurisdiction in takings cases.

Amicus curiae submits that it is the developer who should decide whether she wishes to reapply for a land use approval or risk litigation on her takings claim over the denial of one application. This Court should also clarify the confusion in the lower federal courts over the scope of the reapplication rule and hold that while the one application rule is always applicable to "as applied" challenges, the reapplication requirement is not relevant to substantive due process and equal protection claims. Because such claims challenge the *rationality* of a regulatory decision and do not require proof that a landowner's property has been rendered valueless by the regulation, these two claims do not require speculation on what forms of less intensive development a local government might have permitted.

This Court required applicants specifically to apply for a variance to make their takings claims ripe, but it should recognize that a variance is only one type of administrative relief available to landowners. The type of administrative relief available depends upon the land use regulatory system the local government has adopted. The transfer of development rights system option available in this case is simply another form of administrative relief available in many land use regulatory systems.

This Court should also recognize a *futility* exception to the ripeness rule and should apply it after a landowner has made one application for a land use approval or administrative relief. Landowners should be able to rely

on a number of factors, including official statements and local land use policies and regulations, to show futility.

This Court should also eliminate the second prong of the ripeness doctrine that requires landowners to seek and be denied just compensation through available state procedures. Landowners with regulatory takings claims should be able to pursue their federal compensation remedy in federal court.

ARGUMENT

The Petitioner, Mrs. Suitum, did not seek authorization for transferable development rights ("TDRs") under the land use and development regulations of the Respondent, the TRPA. Therefore, the Court of Appeals for the Ninth Circuit properly held that Plaintiff's regulatory taking claim was premature under the "finality requirement," the first prong of the ripeness standard enunciated in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The Ninth Circuit stated:

> Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form [ ] of relief . . . which might abate the alleged taking." Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis.

Suitum v. Tahoe Regional Planning Agency, 80 F.3d 359, 362-63 (9th Cir. 1996) (citations omitted).

I. MRS. SUITUM'S TAKINGS CLAIM IS NOT RIPE BECAUSE SHE DID NOT SUBMIT AN APPLICATION FOR TRANSFERABLE DEVELOPMENT RIGHTS (TDRS) TO ENABLE A COURT TO DETERMINE THE EXTENT OF ECONOMIC IMPACT OF TRPA'S LAND USE REGULATORY SYSTEM.

In the context of land use regulation, this Court's ripeness doctrine was intended to address the Article III posture of *regulatory takings* claims by determining if, and the extent to which, the decision maker has inflicted a concrete economic injury to the plaintiff. Ironically, the first land use case in which this Court applied the ripeness doctrine was *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978), a case involving land use regulations that also included provisions for use of transferable development rights (TDRs). The Court rejected a taking claim based on a refusal of the city's landmarks commission to approve a high-rise building over Grand Central Terminal, which had been designated an historic landmark. In rejecting Penn Central's taking claim, this Court based its decision

on lack of ripeness on two factors, noting first that Penn Central had "not sought approval for the construction of a smaller structure" than the proposed 50-story office building. *Id.* at 137. For this reason, the Court did "not know" whether the plaintiff would be denied "any use" of the airspace above the Terminal building. Second, the Court noted that Penn Central could not accurately assert that it had "been denied *all* use" of its "pre-existing air rights" because these rights were transferable to other parcels. *Id.* As to the relevance of the city's TDR program to the takings claim, the Court stated:

> While these [TDR] rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, *are to be taken into account in considering the impact of regulation.*

Id. (citation omitted) (emphasis added)

A. There is No Evidence in the Record that Mrs. Suitum's Property Has Been Rendered Valueless.

In order to conclude that the finality requirement of the ripeness doctrine allows Mrs. Suitum to stop short of making any application under the TDR program, it must be assumed that Mrs. Suitum's property has been rendered *valueless* under TRPA's regulations.[1] However,

[1] Of course, even if that were true, this Court has held that in some circumstances a law that renders property valueless may nonetheless not constitute a taking. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 313 (1987); *Goldblatt v. Hempstead,* 369 U.S. 590, 596 (1962); *United States v. Caltex, Inc.,* 344 U.S. 149, 155 (1952), *reh'g denied,* 344 U.S. 919 (1953); *Miller v. Schoene,* 276 U.S. 272 (1928); *Hadacheck v. Sebastian,* 239 U.S. 394, 405 (1915); *Mugler v. Kansas,* 123 U.S. 623, 657 (1887); *cf. Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1011 (1984); *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 225 (1986). In *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 490 (1987), the Court stated: " 'Although a comparison of values before and after' a regulatory action 'is relevant . . . it is by no means conclusive' " (citation omitted).

there is no evidence in the record below that this is the case. By contrast, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), the state trial court had found that the prohibition against erecting any permanent habitable structures on Lucas's parcels under the state's Beachfront Management Act (the "Act") rendered those parcels " 'valueless' " *Id.* at 1007. The Court in *Lucas* also made clear that its takings jurisprudence makes no assumption that the only uses of property cognizable under the Constitution are " '*developmental* uses,' " stating:

> We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause.

Id. at 1020 n.8. Moreover, this Court in *Lucas* never restricted the "property interest" involved in takings to a developmental interest. In fact, the Court acknowledged

that the "rhetorical force" of its " 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 1016 n.7. The Court observed:

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id. The Court did not need to reach this "difficult question" because the record demonstrated that the Act had left each of Lucas's beachfront lots "without economic value." *Id.*

Plainly the Court's language in *Lucas* indicates that the principal focus of regulatory takings analysis is the impact of the regulation upon *economic value*, not the loss of the opportunity to *physically* develop the property. As in *Penn Central*, the TDRs available to Mrs. Suitum could mitigate the financial burden imposed by TRPA's regulatory system and must be taken into account in considering their economic impact. However, because Mrs. Suitum never submitted an application under the transferable development rights (TDRs) program, she has made it impossible for a court to determine the extent of the economic impact of TRPA's regulatory system on her property. In *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), the Court recognized that "the finality requirement is concerned with whether the initial decisionmaker

has arrived at a definitive position on the issue that inflicts an actual, concrete injury;. . . . " *Hamilton Bank, supra*, at 193. It begs the question for a court to commence an assessment of that impact under a takings claim without the court having the evidence of a TDR application before it. In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986), the Court referred explicitly to use of an available TDR program as one means to satisfy the ripeness question.

> The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other. In *Penn Central Transportation Co. v. New York City*, for example, we recognized that *the Landmarks Preservation Commission . . . had authority in appropriate circumstances to authorize alterations, remit taxes, and transfer development rights to ensure the landmark owner a reasonable return on its property.* [citation omitted] Because the railroad had "not sought approval for the construction of a smaller structure" than its proposed 50-plus story office building, [citation omitted], we concluded "that the application of New York City's Landmark Law ha[d] not effected a 'taking' of [the railroad's] property." [citation omitted]. *Whether the inquiry asks if a regulation has "gone too far," or whether it seeks to determine if proffered compensation is "just," no answer is possible until a court knows what use, if any, may be made of the affected property.*

Id. at 350 (emphasis added).

B. By Merely Filing a Building Permit Application, Mrs. Suitum Did Not Satisfy the One Application Rule Developed in *Agins*, *Hamilton Bank*, and *MacDonald*.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court held that a landowner must obtain a decision on his land use proposal from the local government before he can bring an *as applied* takings challenge. In that case, the plaintiffs had attacked the ordinance facially, as a taking, without submitting a development plan. This Court dismissed the case because the plaintiffs were "free to pursue their reasonable investment expectations by submitting a development plan to local officials." *Id.* at 262. Although the Court in *Agins* did not use the term, the decision clearly meant that a case involving a claim that an ordinance as applied to a landowner's property constitutes a taking is not ripe for a judicial decision unless the plaintiff has submitted a development plan for approval when the ordinance permits such an application.[2]

Once an application is submitted, the applicant must pursue all other required approvals related to that application to enable the decision maker to arrive at a "final,

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[2] In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), this Court held that a *facial* takings challenge, namely, a claim that a regulation on its face and in its entirety, as it applies to all property affected by it (including the landowner's), effects a taking, is not subject to the ripeness doctrine. However, it noted that plaintiffs "face an uphill battle in making a facial attack on [a regulation] as a taking." 480 U.S. at 495.

definitive position" as to the application of the regulations to the plaintiff's land. *Hamilton Bank, supra,* at 191. Mrs. Suitum's building permit application did not satisfy this requirement because the building permit could not issue under TRPA's land use regulations.

This Court again addressed the application requirement in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986). There the plaintiff had submitted one subdivision application and the county had rejected it. Nevertheless, the Court stated that it was not clear the county would not allow "some development," *id.* at 351-52, and explained that the history of the case indicated "not that future applications would be futile, but that a meaningful application had not yet been made." *Id.* at 352 n.8. In addition, the Court stated that "[r]ejection of exceedingly grandiose plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews," suggesting that *reapplication* may be necessary before a court can determine the extent of economic injury. *Id.* at 353 n.9 (emphasis added).

Amicus curiae believes the tension between the *Agins-MacDonald* rule that a landowner must submit one "meaningful" application and the *Hamilton Bank* rule that a landowner must utilize all available administrative relief at the local level, creates a weakness in ripeness law that many local governments have exploited to frustrate *as-applied* takings claims in federal courts. We believe the Court should resolve this tension and create a more precise and fair basis for determining when federal courts have jurisdiction in takings cases.

II. THE COURT SHOULD RESOLVE THE TENSION BETWEEN THE *AGINS-MACDONALD* RULE, THAT A LANDOWNER MUST SUBMIT AT LEAST ONE "MEANINGFUL" APPLICATION FOR APPROVAL, AND THE *HAMILTON BANK* RULE, THAT A LANDOWNER MUST UTILIZE ALL AVAILABLE ADMINISTRATIVE RELIEF AT THE LOCAL LEVEL.

A. Simplify the One Application Rule

The *MacDonald* Court no doubt thought that by elaborating on the *Agins* rule to say that rejection of "grandiose development" plans is not enough and that reapplication is necessary, it was adding clarification to the ripeness doctrine. However, in attempting such clarification the *MacDonald* Court ignored the realities of land use control and, consequently, created an agonizing choice for the landowner. The reality is that what is "grandiose" and what is "meaningful" within the limits of a local planning and zoning program is a matter of judgment. Because of the *Agins-MacDonald* and *Hamilton Bank* rules, the landowner whose development proposal has been denied, does not know what to do. Should the landowner "reapply" with something less ambitious, or apply for relief from the land use agency? If the landowner decides to reapply, the landowner does not know how many times to reapply – risking that a court will decide that her project is "grandiose" or that her application is not "meaningful" no matter how many times it is rejected, and require her to apply again. Neither is it clear who has the burden of proof to show that the reapplication process has been exhausted.

Amicus curiae submits its brief on behalf of an association of planners, many of whom work for local governments. Many other planners who belong to the association work for members of the development community. In fairness to the development community, it must be recognized that the *reapplication* requirement invites local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of the reapplication rule and is why such a rule is unrealistic and should no longer be required to demonstrate ripeness for adjudication.

Amicus curiae submits that, as discussed below, the determination of when "enough is enough" should not be left to the local governments to decide.[3] Rather, it should be for the landowner or developer who must weigh the risks of litigation versus another application proposal to decide whether in fact to contest the decision rendered after the first application. Unless the Court's ruling in the case *sub judice* resolves this tension between the *Agins-*

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[3] In fact, many lower federal courts have openly admitted their difficulty in determining "when enough is enough" under this aspect of the "finality" requirement. *See, e.g., Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D.Hawaii 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667 (E.D.Va. 1985).

MacDonald rules, that a landowner must submit a "meaningful" plan for approval, and the *Hamilton Bank* rule, that a landowner must utilize all available administrative relief at the local level, landowners will continue to be faced with an agonizing and unfair choice. Put simply, if the landowner seeks administrative relief before reapplying with a less "grandiose" project, the reapplication requirement of the ripeness rule will, in all likelihood, bar the landowner's takings claim. That surely is not the result that this Court intended under the "finality" requirement of the ripeness doctrine.

B. The *Reapplication* Rule Is Irrelevant to Due Process and Equal Protection Claims.

In *MacDonald*, the Court stated that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 351. Many lower courts have focused upon this sentence and, where they have found a takings claim to be unripe, have dismissed substantive due process and equal protection claims as equally unripe. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994); *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir.), *cert. denied*, 488 U.S. 851 (1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.), *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988); *Ochoa Realty v. Faria*, 815 F.2d 812 (1st Cir. 1987); *Golemis v. Kirby*, 632 F. Supp. 159

(D.R.I. 1985). Other courts, however, have declined to apply the reapplication rule. *See Carroll v. City of Prattville*, 653 F. Supp. 933 (M.D. Ala. 1987); *Oberndorf v. City and County of Denver*, 900 F.2d 1434 (10th Cir.), *cert. denied*, 498 U.S. 845 (1990).

The Court of Appeals for the Ninth Circuit, following its earlier ruling in *Kinzli*, held in this case that Mrs. Suitum's substantive due process and equal protection claim were also premature under the ripeness doctrine. *Amicus Curiae* submits, however, that because substantive due process and equal protection claims challenge the *rationality* of a regulatory decision and do not require proof that a landowner's property has been rendered valueless by the regulation, these two claims do not require speculation as to what forms of less intensive development might have been permitted by the local government. This Court should clarify the confusion in the lower federal courts on this issue and rule that while the *one application* rule reasonably applies to substantive due process and equal protection claims, the *reapplication* rule is not relevant.

III. *HAMILTON BANK* REQUIRED TAKINGS PLAINTIFFS TO APPLY FOR A VARIANCE TO MAKE THEIR TAKINGS CLAIMS RIPE, BUT THE RELATED APPROVALS NECESSARY TO MAKE A TAKINGS CASE FINAL SHOULD DEPEND ON THE TYPE OF LAND USE REGULATORY SYSTEM.

In *Hamilton Bank*, this Court held a takings case not final because the plaintiff had not applied for a variance from applicable subdivision control regulations. This

Court's emphasis on the need for a variance has confused lower federal courts that have tried to apply *Hamilton Bank*. The reason is that zoning systems usually include other forms of administrative relief besides the variance, and this Court should provide guidance on when administrative relief besides a variance is necessary.

Under the traditional Euclidean zoning system, the variance was originally conceived as a "safety valve" to give relief to a landowner while protecting the ordinance from invalidation on the constitutional ground that the particular landowner's property was burdened to a greater extent than other land in the vicinity, in violation of the due process clause.[4] The courts generally distinguish between a use variance and an area variance. The area variance fits the notion that was originally intended in the State Standard Zoning Enabling Act (SSZEA) promulgated by the U.S. Department of Commerce in 1926. It authorizes departures from ordinance restrictions on the construction or placement of buildings and other structures. In other words, the area variance allows adjustments to the requirements for yards, height, frontage, setbacks and similar dimensional aspects. A use variance quite simply permits a use that is otherwise prohibited in the particular zoning district. *See, e.g., City of Merriam v. Bd. of Zoning Appeals of the City of Merriam*, 748 P.2d 883 (Kan. 1988).

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[4] *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (invalidating a zoning ordinance on constitutional grounds as applied to a particular parcel, and articulating a balancing test weighing the public interest against the private interest).

Traditional zoning systems also usually include another form of administrative relief, known as a "conditional use" or "exception." A conditional use is a use authorized by the zoning ordinance if certain criteria are met, such as a requirement that the use be compatible with uses in the surrounding area. The conditional use is not a safety valve. It is not appropriate to require a takings plaintiff to ask for an amendment, as some federal courts require, because an amendment is a legislative, not an administrative, act. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 938 F.2d 153 (9th Cir. 1991).

There are also land use systems based on what is known as "performance" zoning. Performance zoning is a flexible zoning technique designed to permit maximum development on a site in a manner that minimizes impacts upon neighboring uses and systematically avoids the wastage of land and the destruction of natural resources.[5] Under performance zoning, each tract of land is considered unique – a function of its size, shape, and natural features. Unlike conventional zoning, which controls development by means of rigid lot size, setback, and housing regulations, performance zoning controls intensity of development with standards that set maximum density, impervious surface coverage, and minimum open space, or buffer yards. For example, in the residential land use context, performance zoning utilizes two key elements: (a) bufferyard standards that provide a range of options to a developer; and (b) housing-type options

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[5] *See generally*, L. Kendig, Performance Zoning (American Planning Association 1978).

based upon site capacity analysis. Flexible bufferyard provisions enable a developer to build at varying land use intensities on a particular site without significantly impacting neighboring land uses. Housing-type options based upon site capacity analysis free the developer of the restrictions in sizes and types of housing under conventional zoning districts and enable the developer to provide housing at various sizes and scales of units in response to a fluctuating housing market, subject to performance criteria. In this type of regulatory system, "variances" are not typically relied upon as a relief or adjustment mechanism. Rather, the municipality simply decides to give or withhold approval as part of an administrative decision making system.

It is important, therefore, that the extent to which approvals relating to an application must be pursued is assessed within the context of the particular type of land use system, whether it be based on a Euclidean zoning system, a performance zoning system, or some other type of land use control system. Transfer of development rights (TDR) is simply another form of administrative relief available in many zoning systems, including traditional and performance zoning. Transfer development rights are well recognized in many jurisdictions as an integral component of the local government's overall land use regulatory system, particularly in efforts to preserve agricultural lands and natural resource areas.[6] In New Jersey, for example, the Pinelands TDR program has made it possible to mitigate the effects of regulations

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[6] 3 Edward H. Ziegler, Jr., RATHKOPF'S THE LAW OF ZONING AND PLANNING at § 39.02[d] (1996).

enacted to preserve unique resources of the pine-oak forest and wild and scenic rivers, which include habitats for many rare, threatened and endangered plant and animal species.[7] In addition to preserving these resources, TDR regulations protect the seventeen-trillion-gallon Cohansey aquifer, believed to be one of the largest untapped sources of pure water in the world.

Many local governments have also enacted TDR programs to save open space.[8] Programs can be found in Malibu and Monteray Counties, California, and cities and towns in Florida, New Jersey, Vermont, Montana and Pennsylvania. For example, the 3,100 acre special study area in the Cross Creek region of Alachua County, Florida, with its exceptional wetlands and upland habitat areas, has been saved through the use of TDR.[9]

Another major area in which governments have put TDR to work to save critical resources while preserving property rights is landmarks preservation.[10] Private

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[7] *Mary Gardner v. New Jersey Pinelands Commission*, 125 N.J. 193, 198; 593 A.2d 251 (1991). The U.S. Congress enacted The National Parks and Recreation Act of 1978 to establish the one million acre Pinelands Natural Reserve. Pub. L. No. 95-625, § 502, 92 Stat. 3492 (codified at 16 U.S.C.A. § 471i) (1996).

[8] 3 Edward H. Ziegler, Jr., RATHKOPF'S THE LAW OF ZONING AND PLANNING at § 39.02[e] (1996).

[9] *Glisson v. Alachua County*, 558 So. 2d 1030, 1036 (Fla. Dist. Ct. App. 1st Dist. 1990), *review denied*, 570 So.2d 1304 (Fla. 1990).

[10] *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978); *Shubert Organization, Inc. v. Landmarks Preservation Comm'n*, 166 A.D.2d 115, 117-18, 570 N.Y.S.2d 504 (1st Dep't 1991), *appeal dismissed without op.*, 78 N.Y.2d 1006, 575 N.Y.S.2d 456, 580 N.E.2d 1059 (1991), *and appeal denied*, 79 N.Y.2d

property owners, developers, planners and preservationists all benefit by the use of TDR in landmarks preservation. The use of TDR today enables future generations to experience and appreciate our historic resources.

In short, over the last 30 years TDR programs to preserve critical natural resources, open space and landmarks have become important and integral components of land use planning and regulatory programs in this country.

IV. THIS COURT SHOULD RECOGNIZE A FUTILITY EXCEPTION TO THE RIPENESS RULE AND SHOULD REQUIRE COURTS TO APPLY IT AFTER A PLAINTIFF HAS MADE ONE APPLICATION FOR A LAND USE APPROVAL OR ADMINISTRATIVE RELIEF.

This Court, of course, has recognized that a landowner is not required to use "unfair" procedures or to make "futile" applications. *Hamilton Bank, supra,* at 205-206 (Stevens, J., concurring). However, this Court seems to be unaware of the importance of exceptions to the ripeness doctrine or the impact they could ultimately have on the doctrine scope and effect. *Amicus curiae* submits that the major difficulty is that this Court sees more certainty and less discretion in the land use control process than actually exists, and views its final decision requirement as a simple requirement, easily met. Nothing

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751, 579 N.Y.S. 2d 651, 587 N.E.2d 289 (1991), *and cert. denied*, 504 U.S. 946, 112 S. Ct. 2289 (1992).

could be further from the truth in a system where judgments are qualitative and administration requires the exercise of substantial discretion.

Cases in the Ninth Circuit have developed the futility exception most fully. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988). This case held the futility rule applies after a plaintiff has made one application or an application for a variance.

It is respectfully submitted that the "futility" exception should *always* apply after one application has been made for a land use approval or administrative relief. In addition, the "one meaningful" application suggested in *MacDonald*, because it has been abused by many local governments and misinterpreted by the lower courts, should not be used to gauge whether the futility exception is satisfied. Rather, the finality requirement should be applied reasonably to recognize that a local government's position on the nature and intensity of development can be determined from factors other than repeated applications and denials. These factors should include:

1. Site feasibility studies (*i.e.*, environmental)
2. Statements of officials before and during the application process
3. Local land use policies and regulations
4. The history of zoning and other land use decisions in the community
5. The nature of surrounding land uses.

A. Site-Specific Studies, Including Environmental Studies

Often a land use agency will reject a development because site conditions make it ineligible for approval. For example, an ordinance may allow approval of a conditional use only if services available to the site, or adequate. If a land use agency rejects a proposal because services at the site are inadequate, the applicant should be able to show that further application is futile because services are adequate yet the agency refused to give approval.

B. Statements of Officials Before, During and After the Application Process

Local zoning officials often make statements on pending land use applications, either during a hearing or in public. These statements can demonstrate that further application is futile, once land use agency has rejected an application.

C. Local Land Use Policies and Regulations

Often a land use agency will reject a land use application because of a local land use policy continued either in a comprehensive plan or in development regulations. Unless there is some evidence that the municipality may be willing to change the policy, further application will be futile.

D. The History of Zoning and Other Land Use Decisions in the Community

The rejection of a plaintiff's development application may simply be part of a pattern of similar rejections in the community. For example, the application may be for low-cost housing and the applicant may be able to show the community has regularly rejected applications for such housing. Evidence of this also should be enough for a futility holding.

E. The Nature of Surrounding Land Uses

The nature of surrounding land use is often critical to the success of a land use application, such as an application for a conditional use. If an application is rejected in this kind of case because the land use agency claims surrounding uses are incompatible, but the applicant can show they are compatible, further application will be futile and the claim should be ripe.

V. THE COURT SHOULD ELIMINATE THE SECOND PRONG OF THE RIPENESS DOCTRINE REQUIRING THE LANDOWNER TO HAVE SOUGHT AND BEEN DENIED JUST COMPENSATION THROUGH AVAILABLE STATE PROCEDURES AND ALLOW LANDOWNERS WITH REGULATORY TAKINGS CLAIMS TO PURSUE THEIR FEDERAL REMEDY IN FEDERAL COURT.

When the Supreme Court first adopted the ripeness rules in *Hamilton Bank*, it held that one prong of the doctrine requires takings plaintiffs to seek compensation in state court if it is available. Lower federal courts have

abused this requirement. Some courts require a showing that state courts will grant a compensation remedy. *See, e.g., Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1693 (1995); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031 (6th Cir. 1991); *Ochoa Realty Corp. v. Faris*, 815 F.2d 812 (1st Cir. 1987). Other courts bar plaintiffs from federal court even when it is not clear a state court remedy is available. They hold a plaintiff must attempt to seek compensation in state court until the state court holds the compensation remedy is unavailable. *See, e.g., Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573 (7th Cir. 1990); *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb County Planning & Zoning Comm'n*, 896 F.2d 1264 (11th Cir. 1989).

These holdings effectively drain the ripeness rules of any meaning. They prevent federal courts from ever reaching the final decision issue because, under this view, a takings plaintiff must seek compensation in state court until that court clearly says it will not entertain a compensation remedy.

Some federal courts take an even more extreme position on the availability of a state compensation remedy. They hold that takings plaintiffs must sue in state court under the implied federal constitutional action for compensation created in *First English. Tari v. Collier County*, 56 F.3d 1533, 1537 n.23 (11th Cir. 1995); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993); *Northern Va. Law School, Inc. v. City of Alexandria*, 680 F. Supp. 222 (E.D. Va. 1988). This view of ripeness even more clearly makes the ripeness rules an absolute bar to a

taking remedy. The federal constitution is always actionable in state court. If takings plaintiffs must always sue in state court first on the federal remedy, they will never establish federal court jurisdiction over a takings claim.

This problem becomes even more serious if a takings plaintiff cannot return to federal court once a state court adjudicates the takings claim. A plaintiff usually is barred from relitigating a state case in federal court under res judicata and collateral estoppel principles. An exception exists when a federal court forces a plaintiff into a state court by abstaining, but it is not clear whether it applies when ripeness rules force a plaintiff into state court. *Compare Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) (exception applies), *with Palomar Mobilehome Park Ass'n v. San Marcos*, 989 F.2d 362 (9th Cir. 1993) (*contra*).

Amicus curiae submits that the rule that takings plaintiffs must first sue in state court for compensation under the federal constitution is incorrect. When this Court first adopted the ripeness rules, there was no remedy for compensation in federal courts. Indeed, this Court adopted ripeness rules to avoid deciding whether a federal compensation remedy is available. In the absence of a federal compensation remedy, it perhaps made sense to require takings plaintiffs to seek a state compensation remedy first.

This situation has now changed. In 1987, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 302 (1987), this Court held that a remedy for compensation in takings cases is available under the federal constitution. Federal courts should not require

takings plaintiffs to go to state court to seek compensation before taking advantage of this federal remedy.

A Ninth Circuit panel has now held that the availability of a compensation remedy in state court under *First English* does not satisfy the requirement that a takings plaintiff must sue for compensation first in state court. *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995). The court held that federal ripeness rules require the availability of a state compensation remedy. It stated that "to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant." *Id.* at 860. The court was "satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result." *Id.* at 861.

This issue is important in *Suitum* because forcing the plaintiff to seek a remedy under *First English* in state court will make her case unripe even though she later satisfies the final decision rule. This Court should follow the holding in *Dodd* in order to make it clear that plaintiffs in as-applied takings cases can obtain a ruling in federal court on the federal takings law that this Court has developed so extensively in recent years.

CONCLUSION

This case affords the Court an opportunity to clarify the application of the "finality" requirement of the ripeness doctrine to land use cases so that the requirement serves its intended purpose. That purpose is to encourage

the decision maker to arrive at a definitive position on the issue that is alleged to inflict an actual, concrete and justiciable injury. It is not to encourage the creation of complex, time-consuming review and approval processes that waste the resources of local government and create a climate of regulatory uncertainty that does not promote the public interest.

The Court's ruling in this case should resolve the tension between the *Agins-MacDonald* rule, that a landowner must submit a "meaningful" plan for approval, and the *Hamilton Bank* rule, that a landowner must utilize all available administrative relief at the local level. The Court's clarification and guidance on the "finality" prong of the ripeness doctrine will promote the rational, efficient and predicable and beneficial use of real property in concert with the public interest.

January 9, 1997

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